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WHAT ARE THE LEGITIMATE MINING AND MILLING COSTS TO BE DEDUCTED IN CASES OF INNOCENT TRESPASS.

BY

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INTRODUCTION.

The miner removing his ore from its vein in the earth frequently works over the line into the adjoining property. As the operations are underground where the boundary is not marked this may be done inadvertently, and with no intention to trespass. The ore thus taken from the neighboring land is, in the great majority of instances, intermingled with other ores, so that it cannot be recovered, and the owner is driven to his action for its value. The question then arises as to the amount of the costs the defendant has been put to in getting out the ore to be deducted from the value of the mineral so taken.

The cases present a rather surprising unanimity as to certain items of such costs, and a wide diversity of view as to others. The earliest cases arose in England, in connection with the mining of coal, but these did not touch on many of the points which have arisen in respect to ore mining in this country, where expensive reduction plants are necessary to prepare the product for the market after it has been brought to the surface. But few cases can be found which discuss these milling costs in detail, This indicates that the companies and individuals engaged in such

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litigation, have usually adjusted such allowances by agreement, after a decision on the main point has been reached.

The following pages treat, first of the Innocent Trespasser and distinguish him from the wilful and negligent trespasser. The history of the doctrine of deduction of costs is then related, special attention being given to the early English cases.

Under the forms of action of the Common Law the amount of damages the plaintiff could recover for a trespass depended in part on what action he chose. The codes have generally abolished these forms of action "yet they still rule us from their grave", and their effect is large enough to warrant a discussion of the influence which the form of action has on the amount of costs which may be allowed the one who inadvertently takes ore from another man's land.

With but few exceptions the courts have given little consideration to the wilful trespasser. He is regarded as little better than a thief, and must account to the owner for the value of the property he has taken together with whatever increase in value it may have through the labour and skill he has put upon it.

But the innocent trespasser stands in a different

light. Something is always allowed him for his labour and expense. Just what are the legitimate mining and milling costs which should be deducted in his case is a problem which does not seem to have been carefully and systematically worked out either by the text writers or by the courts.

WHO ARE INNOCENT TRESPASSERS.

In the case of the Durant Mining Co. v. the Percy Consolidated Mining Co.[1] an innocent trespasser is defined to be "One who unintentionally and in honest belief that he is lawfully exercising a right which he has, enters on the property of another, and removes his ore, coal, oil, or timber, or any other valuable appurtenant to his real estate."

Such an unintentional trespass may arise:

(1). In the case of disputed claims, and litigation over the title to lands which is finally decided in favor of the plaintiff. That is, where one goes on the lands under claim of right, and it afterwards turns out that he has no right.[2]

(2). In the case of mistake as to boundary lines.[3]

(3). In the case of lessees holding over under claim of right.[4]

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1. Durant Min. Co. v. Percy Consol. Min. Co. 93 Fed. 166, 35 C. C. A. 252.
2. Resurrection Gold Min. Co. v. Fortune Gold Min. Co. (1904) Colo. 129 Fed. 668, 64 C. C. A. 180.
3. Alta Min. and Smelting Co. v. Benson Min. and Smelting Co. 16 Pac. 565, Ariz. (1888), 145 U. S. 428.
4. Montrozona Gold Min. Co. v. Thatcher, (1904), 19 Colo. App. 371, 75 Pac. 595.

(4). In the case of mines that are being operated under a bona fide expectation of a contract, which the owner knew would be acted on at once.[5]

Where the miners stand by and see their minerals removed without protest or interference, though the trespass may be wilful, yet the owners are estopped to claim that it is.[6]

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5. Trotter v. Maclean, L. R. 13 Chan. Div. 574.
6. Jegon v. Vivian, L. R. 6 Chan. Div. 742.

INNOCENT TRESPASSERS AS DISTINGUISHED FROM WILFUL TRESPASSERS.

Armstrong in his work on the Law of Gold Mining, gives this definition: "One not in possession under any color of title, and not under mistake as to the facts through misapprehending the line removes ore from another's land."[7]

And in the case of the Resurrection Gold Mining Co. v. Fortune Gold Min. Co.[8] the court defined a wilful trespasser to be "One who takes ore from another's land without right, either recklessly or with actual intent."

The test whether one is innocent or wilful in his trespass, is thus the honest belief and actual intention, and not his outward acts, except as they are evidence of the honest belief. It is not his violation of the law or compliance with the law, says the court in the case of the U. S. v. Homestake mining Co.,[9] but his honest belief at the time he commits the trespass, that determines the character of his acts.[10] On the other hand Duff J. in Lamb v. Kincaid,[11] says that "No

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7. Gold Mining in Australia and New Zealand, Henry J. Armstrong, 2nd ed. p. 88.
8. Supra. (2).
9. U. S. v. Homestake Min. Co. 117 Fed. 481, S.D. (1902), 54 C.C.A. 302.
10. Kahle v. Crown Oil Co., 100 N. E. 681, Ind. (1913).

attempt so far as I can find, has yet been made to define with precision the circumstances in which the court will treat a trespasser as wilful within the meaning of the rule; but this much is sufficiently clear upon any explanation of the case that upon that point the existence or non-existence in the mind of the trespasser of a belief in his title to the locus, is not necessarily conclusive." The presumption is always in favor of wilfulness unless a satisfactory explanation of the acts can be made. So it was held in the case of Stone v. U. S.,[12] that "The wrongful taking of the coal in the absence of explanation, or other evidence, raises a presumption of fact that the trespasser takes it intentionally and wilfully. That presumption however is a disputable one, which evidence may so completely overcome as to remove the presumption that it was wilfully done." In accord with this view is that expressed in the United States v. The Ute Coal and Coke Co.,[13] where it was held that there is a legal presumption that one

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12. Stone v. U. S., 167 U. S. 178, (1897).
13. U. S. v. Ute Coal and Coke Co.(Colo. 1907), 85 C.C.A. 302.

who takes, or converts to his own use the property of another, intends to do so, and the jury may lawfully infer from such taking and conversion and reckless disregard of the owner's right and title, an intention to appropriate the property to his own use, in the absence of any evidence of his innocence and good faith.

NEGLIGENCE, AND ITS RELATION TO INNOCENCE AND WILFULNESS.

It is one's duty to know his own property, and the boundary lines which separate his lands from those adjoining him, and to know when his mining operations are approaching the line. This can easily be done by making proper surveys, so that encroachments on the property of others is usually without much excuse.

Thus the court declares in the case of the Atlantic Coal Co. v. The Maryland Coal Co.,[14] that the owner of adjoining property is held to know the boundaries between him and his neighbor. To the same effect was the holding in the case of Little Pittsburgh Mining Co. v Little Chief Mining Co.,[15] that it is the duty of everyone to

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14. Atlantic Coal Co. v. Maryland Coal Co., (1884), 52 Md. 135.
15. Little Pittsburg Consol. Min. Co. v. Little Chief Min. Co., 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226.

exercise ordinary care to ascertain the boundary of his own property and to refrain from injuring the property of others. The Durant case goes even further and says that the jury may lawfully infer that the trespasser had knowledge of the right and title of the owner of the property upon which he entered, and that he intended to enter,-- Everyone must know the boundary of his own land, and in an action of Trespass quare clausum fregit vs. him for passing his own boundaries and entering the lands of another he cannot defend by showing his ignorance of the boundary line.

So where one has the means of ascertaining his boundary line and does not determine its location, he is guilty of negligence. But mere negligence, such as inadvertence in ascertaining the limits of the lands or the rights of the owners will not alone sustain a finding of recklessness, fraud, or bad faith, but it is competent evidence of wilfulness or innocence.

This sharp line of distinction between wilfulness and negligence has not always been maintained by the courts, and the two terms are often used interchangeably. Thus in an Illinois case[16] the negligent trespasser is

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16. Illinois and St. Louis Railway and Coal Co. v. Ogle.(Ill.) 1876.

put practically on the basis of the wilful trespasser. When reckless disregard of another's right and title, and failure to use ordinary care reaches a certain point, it is not only negligence but wilfulness as well.

But where the court instructed the jury that if the plaintiff in error was guilty of negligence in not discovering the line between its claim and that of the defendant in error, they not only might but must find the trespass was wilful and intentional, it was held to be reversible error, beaause such instructions removed all room for the degree of honest mistake, and deprived the trespasser of the defence that his acts were unintentional and innocent.

HISTORY OF THE DOCTRINE. THE RULE IN THE EARLY ENGLISH CASES, AND THE MODIFICATION OF THE RULE.

The Roman law treated those who expended labour or money on property wrongfully taken by them as volunteer servants of the owner, and the early English and American authorities are in accord with the civil law in that respect.[17]

Kent says it was a principle settled as early as the time of the year books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape and be entitled to the ownership of it in its state of improvement if he could prove the identity of the original materials; as if leather was made into shoes, or cloth into a coat, or if a tree be squared into timber.[18]

So that originally, in the English law the plaintiff owner was entitled to recover the thing itself with all the increased value the defendant trespasser had placed upon it by his labour and skill, or the value

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17. Y.B. Hen. VII 155. 2 Blackstone Com. 464.
18. 2 Kent Com. 362.

thereof, and this was held to apply to the innocent trespasser as well as the wilful one. The state of mind or motive of the defendant could not be taken into account. So it was held in Martin v. Porter.[19] Afterwards this harsh rule was modified, and in a close case where the trespass was clearly proved, but without fraud, the rule was laid down that the defendant was liable only for the value of the coal, deducting the cost of its severance, and carrying to the mouth of the mine.[20]

And in an action of Trover the jury were instructed that if they found the defendant acted fairly and honestly, under a claim of right, they were to give the fair value of the coal as if the coal field had been purchased for the defendant from the plaintiff.[21] In the case of Livingstone v. Rawyards Coal Co.[22] Lord Blackburn, reviewing the decisions in the early cases said: "There was a technical rule in the English courts in these matters, when something that is part of the realty, is severed from the realty, and converted into a chattel, then instantly on its becoming a chattel, it

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19. Martin v. Porter, 5 M. & W. 351.
20. Ashton v. Stock, L. R. 6 Chan Div. 719.
21. Wood v. Morewood, 3 Q. B. 440.
22. Livingstone v. Rawyards Coal Co., L. R. 5 App. Cas. 25.

becomes the property of the person who was the owner of the fee in the land, while it remained a portion of the land, and then in estimating the damages against the person who had converted and carried away that chattel, it was considered and decided that the owner of the fee was to be paid the value of the chattel at the time when it was converted, and it would in fact have been improper, as qualifying his own wrong, to allow the wrongdoer anything for that mischief which he had done, or for the expense which he had incurred, in converting a piece of rock into a chattel, which he had no business to do. Such was the rule at common law. Whether or not that was a judicious rule at any time, I do not take upon me to say, but a long while ago Park B. put this qualification upon it, as far as I am aware, for the first time. He said, 'If the wrongdoer had taken it perfectly innocently and ignorantly, without any negligence, and so forth, and the jury, in estimating the damages, are convinced of that, then you should consider the mischief that has been really done to the plaintiff who lost it while it was a part of the rock, and therefore you should not consider its value when it had been turned into a piece of coal, after it had been severed from the rock. But you should treat it

at what would have been a fair price if the wrongdoer had bought it while yet a portion of the land, as you would buy a coal field.' Wood v. Morewood. That was the rule followed in Jegon v. Vivian which has been so much mentioned. It was followed in the court of chancery, and so far as I know, it has not been questioned since, that where there has been an innocent wrongdoing the point that is to be made out of the damages is, as was expressed in the minutes of the decree, the defendant to be charged with the fair value of such coal, and other minerals, at the same rate as if the mines had been purchased by the defendant at the fair market value of the district".

In these earlier cases the question of damages for coal mined under a bona fide claim of title did not arise, nor was it considered, nor decided by the court. The question in these cases was the measure of damages which the plaintiff was entitled to for mineral taken wilfully or through the negligence of the defendant. When the former question did arise in Wood v. Morewood the Judge instructed the jury in favor of the milder rule, although in a former case, upon a motion to set aside the verdict, he had expressed himself as pleased with the rule laid

down in that case.[23] Yet here he expressly decides that the rule did not apply where the mineral was mined under a claim of title. And in the subsequent case of Wild v. Holt[24] the same judge interrupted the counsel in argument by saying, "that Martin v. Porter establishes, as against a wrongdoer, that no such abatement ought to be made, but the jury were at liberty to find as damages the full value of the coals, when they first existed as chattels, in consequence of the trespass.

The same question came up again in Hilton v. Woods,[25] and Malins V.C. said, "It is clear upon the authorities, a different principle is applicable when the property is taken inadvertently, or as in the present case under a bona fide claim of title, and when it is taken fraudulently with full knowledge that he is doing wrong, or in other words committing a robbery".

This case was followed by the leading case of Jegon v. Vivian[26] in which the courts attention was called to the earlier cases which laid down the harsh rule, but Lord Chancellor Hatherley said, "It strikes me as a strong measure to give a man, instead of the value of his coal, the great advantage of having it worked, without any expense of getting or hewing. It seems a rough and ready

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23. Supra (19).
24. Wild v. Holt, 9 M. & W. 671.
25. Hilton v. Woods, L.R. 4 Eq. 432.
26. Supra (8).

mode of doing justice though the remark that a wilful trespasser ought to be punished is worthy of observation, and further, as was said by one of the judges, when you deprive a man of his property in this way, you deprive him of the management and control of his own property, and he might have made a better bargain. All that, however is a matter of speculation, and it seems to me the judges have founded their decision on the ground of wilful trespass, as in Martin v. Porter when Baron Park expressed himself as being pleased with the rule."

The last of the leading English cases on this subject is that of In re United Collieries Co.[27] Here again the early severe rule was called to the attention of the court, but Sir James Bacon said that although the trespass was fully proved, yet as there was no suggestion of fraud it was a case for the application of the more lenient rule, and held that the defendant was liable only for the coal, deducting the cost of severance and carrying to the pitt's mouth.[28] See note to Franklin Coal Co. v. McMillan.

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27. In re United Collieries Co. L. R. 15 Eq. 46.
28. Franklin Coal Co. v. McMillan 49 Md. 549, 33 Am. Rep. 280.

So then the whole line of English decisions, hold that the severe rule of the early cases, that the innocent trespasser has no rights as against the plaintiff owner of the lands, has no application where the mineral is taken under a bona fide claim of title. This may now be taken as the settled rule in the English courts, both of law and equity, and it has become the rule of the American courts as well.

A similar qualification is now made to the original rule in the case of lessees holding over under a claim of right and where a mine is operated under a bona fide expectation of contract, in fact in all cases where there is honest belief that the defendant is exercising a right. And even in cases of negligent and wilful action on the part of the defendant the courts show a disposition to vary from the harshness of the original rule. This tendency is illustrated by a Nevada case of 1888, where the defendant extracted and removed 553 tons of ore which he converted to his own use. There was evidence in the case which might bring the measure of damages within the harsher rule. Plaintiff, by its agent had remonstrated with the defendant and denied his right to locate the mine or work upon it or to remove the

ore therefrom. Nevertheless the court allowed the defendant the cost of extraction and reduction.[29]

THE INFLUENCE OF THE FORM OF ACTION IN WHICH THE CASE IS BROUGHT ON THE AMOUNT OF COSTS ALLOWED THE INNOCENT TRESPASSER.

Before the introduction of the code provisions abolishing the common law forms of action, the particular form in which plaintiff brought his action might materially effect the amount of recovery.[30] The courts of law were trammeled by the old forms and the principles upon which they were supposed to rest, such as tirle in replevin, and conversion in trover, and they found it difficult to adopt a rule which would lead to uniformity in all cases, and much of the conflict in the early decisions grew out of these forms, and the difficulty of confining the owner to mere compensation, where the principles of the law allowed a larger recovery from the trespasser.

For instance if one brought his action in replevin he could take his property wherever he could find it so long as he could establish its identity, but if he chose

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29. Aurora Hill Min. Co. v. Eighty Five Min. Co. 34 Fed. 515.
30. Foote v. Merill, 54 N. H. 490.

to sue in trover for damages for the taking, he waived his right to recover the property.[31] In trespass or conversion the plaintiff could only have received the value at the time the property was taken, at least where there was mistake. In replevin he could take the property as he found it, but this rule has been modified in some of the recent cases even in the common law states, and damages are sometimes given in actions of replevin. This in a Mississippi case[32] the court said that damages are determined upon the same principles in actions of replevin as in trespass.[33]

So with the action of trover. There is no reason why the measure of damages in trover should be different from that in any other action sounding in tort, and to hold that there is such a distinction is to permit the form of the action rather than the actual injury complained of to fix the damages, and plaintiff could increase the amount at pleasure simply by suing in trover.[34] Where circumstances of aggravation, or injury to the surface of the ground are relied on to increase the amount of damages to be recovered, it may still be

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31. Weymouth v. C. and N. W. Ry. Co. 17 Wisc. 567, 84 Am. Dec. 763.
32. Hurd v. James, 49 Miss. 236.
33. Brown v. Sax and Kimble, 7 Cowan N. Y. 94.
34. Winchester v. Craig. 33 Mich. 205.

necessary to sue in trespass rather than in trover, but many of the states have attempted by statute to do away with the distinction, and to make an action in trover, in that respect, as full and complete a remedy as in trespass.

The old common law rule was that the plaintiff could have his option, but as usually the thing was of higher value after it was severed than before, the plaintiff would of course elect to sue in trover where he could recover the value of the property with interest from the time of its conversion.[35] But where the thing severed was of higher value before it was severed from the realty than afterwards, as in the case of a shade tree that has been cut down, the plaintiff would of course elect trespass, and in such an action he was entitled to recover the diminution in the value of his land.

The courts of chancery were never hampered by the forms which prevailed in the common law, and they possessed a power and means of doing exact justice, as near as possible, in each case, Equity did not enforce forfeitures, nor give punitive damages. The fundamental rule was to afford just compensation to suitors.[36] Now it is quite universally held that the rule is the same in actions at law and in equity. A court of equity

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35. New Dunderberg Min. Co. v. Old, 97 Fed. 150.
Hamer v. Hathaway 33 Cal. 117.

cannot give a different measure of damages from that which prevails at law[37] and the only distinction now recognized is where the owner has elected to waive his action for conversion or injury to the personalty, and brings his action for injury to the land. In such a case the gist of the action is the injury to the realty, and the value of the ore is included in appreciation of the damages. Such an action must necessarily be in trespass and not in trover.[38] These forms of action have been abolished in most of the states by the codes, but even where they have not been formally superceded the text writers all agree that the tendency of recent decisions is to look less to the form and more to the substantial object of all actions, and to regulate the recovery and the costs by a rule of compensation looking to the intention of the trespasser. In Ayers v. Hubbard,[39] the court remarking upon this point said, "In civil actions the amount of recovery does not depend upon the form of action in a case like the present, but whether it be in contract or in tort the proper measure of damages, except where punitive damages are allowed, is in-

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37. Supra, note 14.
38. United States v. Magoon, Fed. Cases 15705.
39. Ayers v. Hubbard, 32 Alb. L. J. 217.

demnity to the party injured, which is the natural, reasonable, and proximate cause or result of the wrongful act complained of. This point was made the subject of comment in a Colo. case[40] by Reed C. "Although under our code different forms of actions are abolished the principles controlling the different forms of action remain the same as before its adoption, Consequently the law applicable, and to be administered in each case depends as much as formerly upon the nature of the case, the allegations and the distinctive forms the case assumes.

It seems on principle therefore that where a party makes his election and adopts trover the rule of damages is and should be the proper compensation for the property taken and converted, regardless of the manner of entering and taking. Where the code provides, as in California, that there shall be but one form of action in all cases either at law or equity it would seem as if it could make but little difference how one brings his action, yet even here the careful pleader will bring his action in the form which would hage been most to his advantage at the common law.

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40. Omaha Min. and Smelting Co. v. Tabor, 13 Colo 41, 21 P. 925, 5 L. R. A. 236.

NO COSTS TO BE DEDUCTED IN CASE OF WILFUL TRESPASSERS.

The law is well settled in the case of wilful trespassers. In a general way it may be said that no costs of any kind are to be allowed to them. They are looked upon as near robbers, to use the language of Malins V. C. in Hilton v. Woods[41] and the courts do not show them any leniency.

Since the decision of Baron Parke in Wood v Morewood[42] a milder rule has been applied in the case of innocent trespassers but the harsh rule continues as to wilful ones. The latter are charged with the value of the mineral after it has been severed from the freehold, and taken from the mine without allowing for any of the expense or getting it. This rule has been applied where the courts have found fraud;[43] where there has been negligence;[44] where there has been wilful acts on the part of the defendant;[45] and where the defendant has acted

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41. L. R. 4 Eq. 432.
42. Supra 21.
43. Supra, Eccles. Commissioners v. N. E. Ry. Co., L. R. 4 Chan Div. 845.
44. Supra 21.
45. Supra 19.

in a manner unwarranted and unlawfully.[46]

The strict rule has also been applied where the facts show that the trespass has been malicious, or with the full knowledge of the title of the injured party, or in the wilful disregard of his rights. A recent California case[47] held that if the mistake was intentional, and with full knowledge of plaintiff's rights, the defendant would be chargeable with the value of the mineral after reduction, without any deduction for the expense of mining and milling. Patchen v. Keeley[48] was a Nevada case in which an action of trespass was brought against the defendants for wrongfully entering upon plaintiff's mining claim and removing and converting to their own use ore thereon. The court left the question of innocence or wilfulness to the jury, and instructed them that if they found the trespass to be intentional, and without any fair belief of any title in themselves, no deduction should be allowed for working expenses. In other words, plaintiffs were entitled to the enhanced value of the property.[49]

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46. Llynn Co. v. Brodgden, L. R. 11 Eq. 188.
47. Lightner Min. Co. v. Lane, 161 Cal. 689.
48. Patchen v. Keeley, 19 Nev. 404, 14 Pac. 347.
49. Nesbitt v. St. Paul Lumber Co. 21 Minn. 491.

So in the case of a wilful trespass on a timber claim and removal of the timber therefrom, it was held that damages were properly assessed at the value of the logs as they were banked on the stream, and lakes near where they were cut, and defendants were not entitled to credit for labour expended upon the timber, but were liable for the full value when seized.[50] As applied to mining the general rule in this regard was well expressed in the case of Wilver King C. M. Co. v. Silver King Consol. Min. Co.[51] that "The measure of damages for ore taken from the land of another without right is the enhanced value of the ore when it is fully converted to the use of the trespasser without allowance to him for the labour bestowed or expense incurred in removing it and preparing it for the market". A similar rule has been laid down in other leading American cases.[52]

This was in fact simply the old English rule in regard to all trespassers, which was adopted in this country so far as wilfulness was concerned, and has

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50. Pine River Logging and Improvement Co. v. U. S., 186 U. S. 279,
51. Silver King Coalition Mines Co. of Nev. v. Silver King Consol. Min. Co. of Utah, 204 Fed. 166.
52. Golden Reward Min. Co. v. Buxton Min. Co., 97 Fed. 413; United Coal Co. v. Canyon City Coal Co. 48 Pac. 1045; Bly v. U. S. Fed. cases 1581.

been followed ever since in the national courts, and especially in the supreme court.[53]

But some indication or a modification of the strictness of this rule, and a recognition of the fact that even a wilful trespasser has some rights, was shown in a Nevada case which arose in 1888, where the defendant had extracted and removed 553 tons of ore and converted them to his own use. There was evidence in the case which tended to bring the measure of damages within the severer rule laid down in the cases cited above. The plaintiff, by its agent had remonstrated with the defendant, and denied his right to locate the mine, or work upon the same, or remove ore therefrom, and consistently asserted plaintiff's rights, so there could be no question of defendant's knowledge of plaintiff's claim of title. Nevertheless the court allowed the defendant both the cost of extraction from the soil, and of reduction.[54]

In accord with this view is a somewhat later case

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53. Liberty Bell Gold Min. Co. v. Smugglers Union Min. Co. 203 Fed. 795; Central Coal and Coke Co. v. Penny, 173 Fed. 340; U. S. v. Ute Coal and Coke Co. 158 Fed. 20; Guffy v. Smith 237 U. S. 101.
54. Aurora Hill Min. Co. v. Eighty Five Min. Co. 34 Fed. 515.

in Oregon[55] where the court instructed the jury that the measure of plaintiff's recovery, provided the defendant was a wilful trespasser, was the value of the ore taken out of the vein, deducting the cost and expense of breaking it down, and bringing it to the surface, or mouth of the mine, with the further injunction that where ore has been broken down and taken out by lessees of the defendant company, and the latter has received only a royalty on the ore, the royalty so received might properly be taken to represent the net profit that has been realized by the defendant. And this instruction was held to be correct.[56]

AS TO CONFUSION, AND MINGLING OF ORES.

On the other hand where there is a wilful confusion, and intermixture of the goods, and a mingling of the ores with the purpose of preventing or obstructing the ascertainment of its quality and value, or in disregard of the plaintiff's rights, it is to be regarded as extra wilful, and a jury is warranted in construing such conduct against the defendant in determining the

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55. Hall v. Abraham, 75 Pac. 882.
56. Fitzgerald v. Clark, 17 Mont. 100, 30 L. R. A. 803; Ege v. Kille, 84 Pa. 333; Forsyth v. Wells, 41 Pa. St. 291.

damages.[57]

So in the case of the Matoa Gold Mining Co. v. Chicago and Cripple Creek Min. Co.[58] which was an action on account of an alleged trespass in projecting a tunnel, the court instructed the jury, that where one person wrongfully enters the property of another, and not only commits an injury thereto, but takes away the means of proving with certainty the nature of the loss, the law does not require the person whose property has been damaged to make more than a reasonable showing of the extent of the same, but requires the one committing the trespass, after such has been made, to bear the full responsibility of the uncertainty and confusion which he himself has produced, and to make a full and complete showing of all facts tending to prove the amount of damages he has inflicted, and if the jury believe from the evidence that the defendant has not produced a full record of all the sales of the ore extracted from the property in controversy, then the jury may fix the value, taking into consideration all the circumstances of the case.

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57. Cheesman v. Shreeve, 40 Fed. 787.
58. 78 Min. and Science Press 574.

Lamb v. Kincaid,[59] was a similar action for wrongful working, on the part of the defendant of the plaintiff's placer mining location, where there was evidence of a sinister intention on the part of the defendants, and that they deliverately blended the materials taken from the location with other materials, and converted the whole mass to their own use, and so destroyed the means of ascertaining the quantity taken from the plaintiff's location and the expense of taking the gold therefrom, and it was held that the plaintiff was entitled to recover the total value of so much of the unmixed products as is not strictly proved to have come from the defendants own claim, without deduction of necessary expenses of the winning of the gold. The trial judge refused to make any allowance to the defendant for these expenditures, and on appeal the judges were equally divided. This doctrine has also been applied to cases where the plaintiff labours under great difficulty in proving the exact amount of damages he has sustained, and the defendant has the means in his power of showing the correct amount of gold taken out, and it is considered that if he neglects to do so he cannot complain if

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59. 8 Anno. Cases 36.

the jury have fixed a large estimate on his damages.

The same considerations prevail in cases where the wrongful and careless mining has depreciated the lands and made it more difficult, if not impossible to get out the rest of the ore. In such cases the defendant trespasser must be taxed with the damages sustained by the depreciation of the lands.[60]

It would seem that a like measure of damages prevails where oil has been fraudulently commingled, and the defendant has kept no account or record of the amount of gas produced, and the courts have held that he will be compelled to account for the proportionate part called for by the contract, or the whole amount of the gas produced and sold by it, under the principle which is applied in cases of fraudulent confusion of goods.[61] Some courts have given exemplary damages in such cases of wilful trespass and fraudulent conduct in mingling the ores, and concealing the fraud.[62] But

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60. Franklin Coal Co. v. McMillan, 49 Md. 549, 53 Am. Rep. 280; Little Pittsburg Min. Co. v. Little Chief Min. Co. 11 Colo. 223, 17 Pac. 760,
61. Stone v. Marshall Oil Co. 208 Pa. St. 85, 57 Atl. 183.
62. Barton Coal Co. v. Cox. 39 Md. 1, 17 Am. Rep. 525; Hawk v. Ridgway, 33 Ill. 473.

others have repudiated the doctrine.[63] Under the code in California the plaintiff can be allowed the benefit of defendant's work in mining and milling the ores only upon the theory that it is given as a punishment for the defendant.[64]

THE AMOUNT OF COSTS TO BE DEDUCTED IN THE CASES OF INNOCENT TRESPASS.

As regards the amount of costs to be deducted in the case of the innocent trespasser, who by mistake and honest belief that he is exercising a right, removes ore from another's land the decisions in the various jurisdictions are conflicting and irreconcileable. The Supreme Court of Missouri, in the case of Austin v. Huntsville Min. Co.[65] speaks of the amount of costs to be allowed in such a case as a vexed question. There is a diversity of opinion between the English and American cases and the latter are not the same.[66] All

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63. Britton v. Turner 6 H. H. 481, 26 Am. Dec. 713.
64. C. C. section 3333.
65. Austin v. Huntsville Coal Mining Co. 72 Mo. 535, 36 Am. Rep. 770.
66. Waters v. Stevenson 13 Nev. 157, 29 Am. Rep. 293; Forsyth v. Wells, supra 56; Herdic v. Young, 55 Pa. St. 176; Goller v. Fett 30 Cal. 482; Coleman's Appeal 62 Pa. St. 252-278; Stockbridge Iron Co. v Cone Iron Works 102 Mass. 80.

agree that the owner of the land is not entitled to recover from the innocent trespasser the value of the coal at the surface, after labour and expense has been put upon it. In almost all cases an allowance has been put upon it. In almost all cases an allowance has been made for the cost of bringing them mineral to bank. It may be said to be the general rule that where there is no element of wilfulness in the wrongful act the recovery may be limited. The value of the property of the owner of the land which has been converted can be ascertained and fixed without including the labour expended upon it, hence the law protects the unintentional trespasser in such cases by limiting the right of the owner to recover.[67]

But as to where the limitation is to be placed there is a wide divergence of view. Sometimes an allowance has been made for severance, or separating the coal from the realty, and sometimes it has not. In certain cases a possibility of profit has been allowed the plaintiff owner, and in other cases this has been denied. The

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67. Sedgwick, Damages, 8th ed. Vol. 1, 534; Herdic v. Young, supra 66; Heard v. James 49 Miss. 236; Single v. Schneider 30 Wisc. 570.

The decisions are not uniform as to whether the value of the property when first severed from the realty or the value in its original condition with such damages to the realty as the injury may have caused, would constitute the proper measure.

The earlier English decisions laid down and adhered to the rule that the measure of damages in actions both of trespass and trover, for mining in the lands of another, through negligence or inadvertence, is the value of the coal at the mouth of the pit less the cost of transferring it from the place where it was mined to the mouth of the pit, or if it is transferred or placed elsewhere then less this additional cost, also allowing the wrongdoers nothing for digging them mineral,- that is they allowed the defendant the cost of tramming and hoisting, but nothing for breaking down.

Thus in Martin v. Porter,[68] where the defendant in working his mine broke through the barriers and mined coal on the land adjoining, which belonged to the plaintiff, and raised it for the purpose of sale, it was held in trespass for such working, that the proper estimate

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68. Supra 19.

of damages was the value of the coal when gotten,- that is, when it first existed as a chattel, without deducting the expenses of getting it. In other words it was the sale price at the pit's mouth after deducting the expenses of carrying the mineral from the point in the mine where it was got to the pit's mouth, and he ought to pay for the way-leave. This case was followed by Morgan v. Powell,[69] in which it was said that the defendant had no right to be reimbursed for his own unlawful act in procuring the coal, nor can he bring any charge against the plaintiff for the labour expended upon it. But it could have no value as a salable article without being taken from the pit. Anyone purchasing it there would have deducted from the price, the cost of bringing it to the pit's mouth. That is it allows the innocent trespasser the labour on the chattel after it becomes a chattel, but denies the value of the work of turning it into a chattel, or from realty into personalty.

This strict rule of the early English courts was justified on the ground that an owner should not be forced to sell his property against his will. As Lord Eldon once said, "But when the alleged trespasser is

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69. Morgan v. Powell, 3 Q. B. 278.

taking away that which cannot be replaced, and which constitutes the substance of the mine itself so as to diminish its value when restored to the owner, it constitutes a very different case."[70] It was also considered that there was no adequate reason for a trespass, even in underground work, if proper maps and surveys are used, and proper care is taken. Taking place out of sight as it does, and not likely to be discovered by the plaintiff till such injury has been done the law should attach a penalty to the act, otherwise other people's property would be taken without there being a remedy.[71] This reasoning was well enough as regards mere trespasses over the boundary, but it was largely irrelevant when applied to honest disputes over title, and cases of holding over under honest claim of right, and cases of mining under a bona fide expectation of a contract.

The Isle Royal case[72] gave the innocent trespasser the right to the property in its converted from because the injury inflicted on the owner by the trespasser, and the injustice of taking from the owner his

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70. 2 Story Eq. Juris. 863; Merced Min. Co. v Fremont, 7 Cal. 317.
71. Supra 16.
72. Isle Royal Min. Co. v. Hetton, 37 Mich. 332, 26 Am. Rep. 520.

property against his will, at its market value, should be considered, and the hardship the latter may suffer by the loss of his labour and other expenditures in determining whether this appropriation was a gross and palpable injustice. The defendant cannot force the plaintiff to become a debtor to him for the value of his labour, or demand compensation for his valuable additions to his property that has been converted without the consent of the plaintiff. Nor can he impose any conditions on the right to retake them. The question therefore being whether the defendant shall lose his labour, or the plaintiff lose the right to take his property the law decides in favor of the latter.

Illinois and St. Louis Railroad and Coal Co. v. Ogle,[73] was a case of trespass for entering the close and digging coal, and the question was as to the amount of costs to be allowed, The court decided to allow to the innocent trespasser the labour on the chattel after it had become a chattel, but denied him the value of the work of turning it from realty into personalty. This case was followed by Robertson v. Jones[74] which was also an action of trespass for taking coals from the plaintiff's land,

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73. Supra 16.
74. Robertson v. Jones 71 Ill. 405.

and it was held that he could recover its value at the mouth of the pit less the cost of conveying it, after it was broken down from the mine to the mouth of the pit. The plaintiff is not limited to the value of the mineral taken in the ground. In trofer or trespass he can recover the value of it while in the hands of the person taking, or he can make demand for it in replevin.[75]

The later English cases announced a milder rule as to the amount of costs to be allowed the defendant when there is no element of wilfulness, or such gross negligence as to amount to gross negligence in his action. Thus in Hilton v. Woods[76] was decided that the defendant was only to pay for the value of such coal as if he had purchased the mine of the plaintiff. And in a later case which came up in chancery a tenant for life with certain powers of leasing demised the seams and veins, under a lease of land for twenty years, and for sixty years if he had power to do so. The defendants continued to mine the coal after the twenty years claiming to be entitled to the sixty years. This claim was held to be invalid as to the reversion, and it was decided

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75. Blaen Avon Coal Co. v. McCulloh, 59 Md. 403, 43 Am. Rep. 560; Atlantic Coal Co. v Md. Co. supra 14; Last Chance Min. Co. v. Bunker Hill Min. and Smelting Co. 131 Fed. 579, 200 U. S. 617; Moody v. Whitney, 38 Me. 174; Donovan v. Consol. Coal Co. 187 Ill. 28, 44 N. E. 290; Thomas Pressed Brick Co. v. Herter 162 Ill. 46. 58 N. E. 380.

that the coal so taken was to be paid for by them at its fair market value as if they were purchasers, all the expense of hewing and raising to be allowed. The court said, "The milder rule is that which should guide this court except in a special case. The plaintiff is entitled to recompense for any damage done beyond the actual value of the coal in the course of working".

In accord with this view is the case of Ashton v. Stock,[77] where the defendant had been operating under a bona fide belief as to his title, and in taking the account, was given an allowance of his expenses of severing the coal, as well as in bringing it to bank. Many American cases support this latter view.[78] The early decisions in California, on this point allowed the innocent trespasser the cost of breaking down the ore, as well as those of transportation from the place where it was dug to the mouth of the mine. This question came up for consideration in the case of Maye v. Yappen[79] which held that the proper rule in such a case

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77. Supra 20.
78. Tilden v. Johnson, 52 Vt. 628, 36 Am. Rep. 769; Waters v. Stevenson supra 66; Chamberlain v. Collinson, 45 Iowa 429; Foote v. Merrill 54 N. H. 490, 20 Am. Dec. 151; Baldwin v. Porter 12 Conn. 473; Pierce v. Benjamin, 14 Pick. 356, 25 Am. Rep. 396; McGuire v. Boyd Coal Co. 236 Ill. 69.
79. 23 Cal. 306.

is the value of the gold bearing earth at the time it was severed from the surrounding soil and became a chattel, the judge remarking that this seems a just and proper rule, and one established by the decisions on this question. Three or four years later the case of Gallen v. Fett[80] was litigated, in which the trial court refused to permit the defendant to prove the expenses of digging the gold bearing earth, and was reversed on appeal, the rule being laid down that the damages for wrongfully removing the gold bearing earth from a claim and extracting the gold therefrom are the value of the gold less the expense of digging the gold bearing earth and separating it from the realty. The supreme court of Nevada sharply criticizes both these findings and says, "We can only disagree with them both," holding however that the defendant should be allowed the necessary cost of mining the ore converted by him.

Somewhat later the case of the Empire Gold Mining Co. v. Bonanza Gold Mining Co.[81] and followed Maye v. Yappen, but says that the rule cannot be extended so as

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80. Gallen v. Fett, 30 Cal. 482.
81. 67 Cal. 406.

to permit the defendant who has committed a trespass to justify his act and obtain a verdict by showing the value of the property taken to be less than the expense of its severance from the realty.

After the adoption of the codes the leading case of Lightner Mining Co. v. Lane.[82] In this case twelve thousand tons of ore were removed from the plaintiff's mine by the defendants, and from this the defendants obtained gold to the value of $54,000, after milling it at their own expense. The cost of mining and reduction was half that amount. A verdict for the full amount was modified on appeal, giving the defendants their costs, the trespass being regarded as an inadvertent one, The court remarking on the provisions of the code, said that under the rules laid down in the Civil Code it must be concluded that the plaintiff can be allowed the benefit of defendant's work in mining and milling the ore only upon the theory that it is given as a punishment of the defendant. The general rule of damages is the amount which will compensate the injured party for all detriment caused thereby whether it could have been anticipated or not.[83] For

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82. 161 Cal. 689, Lightner Mining Co. v. Lane.
83. Civil Code section 3333.

a wrongful conversion of personal property the damages allowed are its value at the time of conversion with interest, or if the action has been prosecuted with reasonable diligence the highest market value at any time between the conversion and the verdict, without interest, at plaintiff's option.[84] The subsequent highest market value thus referred to means ordinarily the subsequent value of the thing in the condition it was at the time of conversion. It would not include the value added to it by reason of an improved condition given to it by the defendant after conversion. If the property could be identified in its changed condition the rightful owner might retake it as it is so long as the title remains in him, and he may thus obtain the advantage of the improved conditions. But in this case identification is impossible. It was not claimed that the unmilled ore was or would have been of any higher value than it was when it was mined, and so the giving to the plaintiff of the value added by the milling, as damages is not authorized by Section 3339 of the Civil Code. It can be allowed as exemplary damages under

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84. Civil Code section 3336.

section 3294 as a punishment, where the defendant has been guilty of oppression, fraud or malice.

On principle there seems to be "neither reason, justice nor consistency" in paying a party for his labour in transporting and raising his coal to the mouth of the pit, and paying him nothing for severing it from the freehold,- that is, in getting it into such condition that it could be delivered at the mouth of the shaft. If the labour of the trespasser deserves compensation in the one instance, why not in the other. "By what principle can you apportion the injury done, pay for its continuance, and deny pay for its inception"?[85] The weight of American authority would seem to be with the California cases, holding that the innocent trespasser should be allowed his costs, and the plaintiff can only recover from him the value as it lay in the bed, or as if the defendant had purchased the mine field.[86]

The same reasoning has been applied to the wrongful mining of oil under mistaken belief of ownership. It is the value of the oil less the cost of extraction.

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85. Note to Tilden v. Johnson 36 Am. Rep. 770.
86. Central Coal Co. v. Penny supra 53; Montrozona Gold Min. Co. v. Thatcher supra 4; Turner v. Seep 167 Fed. 646.

Perhaps there is something in the distinction made by the supreme court of Missouri in a recent case,[87] holding that if both the defendant and the plaintiff were engaged in mining operations the value is to be ascertained by deducting from the value of the coal in the market the cost of putting it there, but if the plaintiff is not engaged in mining operations and has no facilities for mining coal, then the value of the coal in situ is the usual royalty paid to the coal owner.

CONFLICTING DECISIONS AS TO OTHER COSTS.

Not only is there this broad divergence of views as to whether or not the costs of separating the mineral from the realty are to be allowed the innocent trespasser, but the decisions are inharmonious and conflicting as to many other costs. The precise measure of allowance to the defendant has been stated in various ways, but in general three groups may be noted.

(1). Those cases which give the plaintiff the value of the mineral before it has been disturbed, thus giving the defendant all his costs. The following will

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87. Lyons v. Central Coal & Coke Co. 239 Mo. 626, 144 S. W. 503.

serve as illustrations of the various forms of statement:

(a). The value of the property before the trespass has been committed.[88]

(b). The value as a part of the realty and not as a chattel after removal.[89]

(c). The value as it lay in its bed.[90]

(d). The value to be allowed as if the defendant had purchased the mine field from the plaintiff.[91]

(e). In the case of Turner v. Seep[92] the court says, if this were a case of a gold mine the recovery of the plaintiff would be the value of the ore in the mine after it had been raised to the surface and treated, and ready for the market. The full measure of damages is the value of the oil as it lay in the earth.[93] These phrases are varied by such an indefinite description as is found in the case of Kahle v. Crown Oil Co.,[94] "The value of the oil and no more".

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88. Ross v. Scott 15 Lea. 479.
89. Stark v. Pa. Coal Co. 88 Atl. 770, Penn. (1913).
90. Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 78.
91. Wood v. Morewood, supra 21.
92. Turner v. Seep 167 Fed. 646.
93. Dyke v. National Transit Co. 158 N. Y. 705, 53 N. E. 1125; Burke Hollow Coal Co. v. Lawson, 151 S. W. 657, Ky. 1912.
94. Supra 10.

(f). As applied to the timber cases the stumpage or standing value has been given as the proper measure of value,[95] and this has been adopted in the land office as the appropriate rule.[96]

Turning to the coal cases we find:

(g). The value of the coal in the ground before it was disturbed by the defendant.[97]

(h). The value of a reasonable royalty for the coal taken in deducting which the court should take into account the royalties paid in the locality for coal of the like quality in similar veins.[98]

(2). A second group of cases give to the plaintiff owner the value of the mineral immediately after severance. These may be introduced by the language used in Coleman's Appeal, where the court in its uncertainty as to the proper rule, gave to the plaintiff,[99]

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95. Single v. Schneider, supra 67; Pine River Co. v. U.S. supra 50.
96. 40 Land Decisions 518.
97. Supra 86.
98. Sandy River Cannel Coal Co. v. White House Cannel Coal Co. 101 S.W. 319, 102 S.W. 320; Caledonian Coal Co. v. Baker 196 U.S. 432.
99. Coleman's Appeal, supra 66.

"The value in place, or at fartherest, when severed."

(j). The value of the coal when first severed from the bed allowing nothing for the digging.[100]

(k). The value of the property at the moment of conversion with interest.[101]

(l). The value immediately after severance or when first taken must govern.[102]

(m). The value of the coal knocked down is the proper measure, or value after it is dug.[103]

(n). The value when first separated from the freehold.[104]

(o). The value of the logs as they were at the moment after they were severed from the freehold. They then became chattels so that trespass D.B.A. would lie for them. This would be greater than the stumpage value probably.[105]

In 1904 the case of the U. S. v. St. Anthony was

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100. Supra 60.
101. Weymouth v. C. & N.W. Ry. Co. 17 Wisc. 550, 84 Am. Dec. 763; Montana Min. Co. v. St. Louis Mill Co. 102 Fed. 430.
102. Sunnyside Coal and Coke Co. v. Reitz 14 Ind. Appl. 478, 39 N.E. 540.
103. U. S. v. Magoon Fed. Casew 15707.
104. Moody v. Whitney supra 75.
105. Cushing v. Longfellow 26 Me. 306.

decided in the supreme court of the U.S.[106] That was a timber case. The court found the trespass to have been unintentional and said, "We think the measure of damages should be the value of the timber after it was cut down, at the place where it was cut." This accords with the rule stated in the leading case of Winchester v. Craig[107] in which almost the same language is used.

(3). Another group of cases give the plaintiff owner not only the value of the mineral, but the possible profit there may be in extracting it from the earth and carrying it to the pit's mouth. This is expressed in a variety of ways.

(p). The value at the pit's mouth less the cost of carrying it there from the place where it was dug allowing nothing for digging.[108]

(q). The value of the ore on the dump less the cost of hoisting. The cost of mining should not be allowed the wrongdoer.[109]

(r). The value of the ore taken less the cost and expense of breaking it down and bringing it to the

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106. U.S. v. St. Anthony 192 U.S. 524.
107. Winchester v. Craig 33 Mich 205.
108. Ill. etc. v. Ogle supra 16; Robertson v. Jones supra 74; Little v. Greek, 223 Pa. 534, 82 Atl. 955; McGuire v. Boyd Coal & Coke Co. supra 78; St. Clair v. Cash Gold Min. Co. 9 Colo. App. 235, 47 Pac. 466.
109. Alta Min. Co. v. Benson Min. Co. 21 Ariz. 362, 16 Pac. 565.

mouth of the mine, or the market value on the dump, after deducting the cost of mining and hoisting, and the expense of smelting and reducing the ore.[110]

(s). The value of the oil at the surface less the reasonable cost of extracting it.[111]

(t). The original value as it lay in the mine less the profit.[112]

THE COST OF TRAMMING AND HOISTING DEDUCTED.

From this analysis of the cases it appears then, that the cost of bringing the mineral to bank from the place where it was separated from the freehold is almost everywhere allowed to the innocent trespasser. As was said in the case of Trotter v. MacLaen,[113] "In all cases an allowance has been made for bringing the coal to bank." Even a wilful trespass has not in every case been sufficient to deprive the defendant of these costs. The general rule in this respect gives the plaintiff the value when first severed from the realty, or the value at the mouth or the pit less the cost of carrying it there

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110. Fitzgerald v. Clark 17 Mont. 100, 30 L.R.A. 803.
111. Gladys City Oil & Gas Co. v. Right of Way Oil Co. 137 S.W. 171.
112. Crawford v. Forest Oil Co. 57 Atl. 47.
113. Supra 5.

from the place where it dug from the earth and became a chattel.

CONFLICT OF DECISIONS AS TO BREAKING DOWN COSTS.

Just why there should be such unanimity in granting the tramming and hoisting costs to the innocent trespass and such conflict over the original cost of separating the ore from the realty it is not easy to say, unless it is because the law got started that way. This further suggestion is worth making, that perhaps it is because the latter are more directly connected with the freehold which belongs to the plaintiff.

As already pointed out in the discussion, if wilfulness can be proved against the defendant he is not, with very few exceptions given this advantage, but the whole value of the property, in its improved condition is charged up to him, although the value of the ore may be increased many times by the mining and removing to the surface, and treatment.[114] Where the trespass is

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114. Donovan v. Consol. Coal Co. Supra 75.

innocent, however, it has been a vexed question with the courts. The text writers say the weight of opinion supports the decision in Ross v. Scott[115] that where there is an honest dispute as to title or boundary and where the trespass is from ignorance, and not wilful, the damages will be confined to the value of the property before the trespass was committed, that is the value of the ore before it was mined, with such damage, if any, as may be occasioned by the impairment of the value of the land by reason of the removal, or mode of removal.

And in the case of Ege v. Kille,[116] where the defendants were in possession under color of title when the trespass was committed. They expended large sums of money in development, and acted in good faith. The decision was that they should be chargeable only for the value of the ore in place.

On the other hand the leading case of Forsythe v. Wells[117] is a good example of the stricter rule as held in the English and American courts. Here the parties

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115. Supra 88.
116. Ege v. Kille, 84 Pa. 333.
117. Supra 56.

were owners of adjoining tracts of coal lands, and the defendant had opened a mine on his own land near the line, and worked it for years. The dividing line was not exactly known, and the plaintiff claimed that the defendant had dug over the line. This was denied. The plaintiff was allowed to prove the value of the mineral after it had been "Knocked down", and the innocent defendant got nothing for his pains. Supporting this harsher rule the following leading cases may be named: St. Clair v. Cash gold Min. Co.;[118] Barton Coal Co. v. Cox,[119] McLean Coal Co. v. Lennon,[120] Ill.& St. Louis Railway and Coal Co. v. Ogle[121], Robertson v. Jones,[122] White v. Yoley,[123] Atlantic Coal Co. v. Maryland Coal Co.,[124] Cushing v. Longfellow,[125] Ivy Coal Coke Co. v. Ala. Co.,[126] Moody v. Whitney,[127]. Supporting the milder rule of Ross v. Scott and Ege v. Kille are the cases of: Single v.

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118. Supra 108.
119. 17 Am. Rep. 525.
120. McLean Coal Co. v. Lennon, 91 Ill. 561.
121. Supra 16.
122. Supra 74.
123. White v. Yoley, 193 Ala. 360.
124. Supra 14.
125. Supra 105.
126. Ivy Coal Coke Co. v. Ala. Co., 135 Ala. 579, 93 Am. St. Rep. 46.
127. Moody v. Whitney, 38 Me. 174.

Schneider,[128] McLean Co. v. Lang,[129] Maye v. Yappen,[130] Gallen v. Fett,[131] Little v. Greek,[132] Durant Min. Co. V. Percy Min. Co.[133] U.S. v. Homestake Min. Co.,[134] Gentry v. U.S.,[135] Stockbridge Iron Co. v. Cone Iron Works,[136] Central Coal & Coke Co. v. Penny,[137] Hall v. Abraham,[138] Austin v. Huntsville Min. Co.,[139] Whitney v, Huntington.[140]

GENERAL MINING COSTS.

In very few cases, if any, is the innocent trespasser allowed to deduct the general costs of running the mine. He is confined to the particular costs that are connected with getting out that particular ore. The cost of running levels, drifts and crosscuts to reach his vein he must stand for himself even in those cases which allow him the cost of digging out the ore from the earth.[141] The trespasser can only limit the owner's

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128. Supra 67.
129. McLean Coal Co. v. Lang 81 Ill. 359.
130. Supra 79.
131. Supra 80.
132. Supra 108.
133. Durant Min. Co. v. Percy Min. Co. 93 Fed. 166.
134. U.S. v. Homestake Min. Co. 117 Fed. 481.
135. Gentry v. U.S. 101 Fed. 51.
136. Stockbridge Iron Co. v Cone Iron Works 102 Mass. 78.
137. Central Coal Co. v. Penny Supra 86.
138. Hall v. Abraham 75 Pac. 82.
139. Austin v. Huntsville Min. Co.72 Mo. 535.
140. Whitney v. Huntington 33 N.W. 561.

recovery by showing the value of the ore taken, and the cost of digging that particular ore from that particular vein. The Oregon case of Hall v. Abraham[142] held that where a party is suing for damages to his mine, and the defendant is a trespasser through inadvertence, he will only be compelled to pay over the value of the ore as it was in the mine, and will be entitled to limit it by the cost of mining and extraction etc. But this should be confined to the actual cost of digging that particular ore from that particular vein, exclusive of running levels, drifts, crosscuts or explorations, development or improvements in discovering and reaching his veins. The general expenses are to be charged to the mining and not to transportation, as between wrongdoers, where the transportation charges are allowed to the trespasser.

Such instructions as those given in the Liberty Bell[143] case were held to be correct interpretations of the law on the point. "In the event you are called upon to determine the cost of mining, transporting and

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142. Supra 55.
143. Supra 53.

treating the ores taken you must consider solely the cost to the defendant of mining, transporting, treating, and converting into money, the particular ores in question. The defendant is not entitled to deduct any portion of the general expense incurred by it in its mining operations not attributable to the particular ore in question, and which it would have incurred had it not mined any of these ores, but had confined itself to the mining, transporting and treatment of the remaining ores extracted from its own territory during the period in controversy."

The appellants in the McGuire[144] case insisted that all work connected with the production, except the actual cost of separating it from its natural position in the ledge by the miner, and the first cost of the construction of the mine, of sinking the shaft, and of permanent structures, should be charged to transportation. But the court decided that the only deduction from the value at the mouth of the mine to which they were entitled was the amount paid for loading and hauling it to the foot of the shaft, hoisting it, and dumping it into the car at the top. As between the wrongdoer, and the owner of the coal, the general expenses of the operation of the mine do not enter into the question. As

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144. Supra 78.

between them such expenditures must be charged to the mining and not to transportation. To the same effect, the jury, in the case of Colo. Central Consol. Co. v. Turck,[145] were not authorized to make an allowance for keeping the various shafts and tunnels in repair in that portion of the defendants mine from which the ore in controversy was extracted because, as the trial court held, the evidence was insufficient to show what expense had been incurred on that account that was properly charged to the plaintiff.

Of the two methods which have been pursued in arriving at the value of the ore in place, that one which deducts from the value at the mouth of the shaft the cost of mining and putting it there, thus giving to the plaintiff a sum equal to the reasonable market value of the mineral at the mouth of the mine, less the expense necessarily incurred in digging and mining such ore and taking it to the mouth of the mine, takes no account of the cost and maintenance of the shaft, machinery and other appliances, the bulk of the fixed charges or other hazards of the business.

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145. Colo. Consol. Co. v. Turck, 70 Fed. 294.

PERMANENT AND TEMPORARY IMPROVEMENTS.

Another distinction has been made between the improvements made by the defendant which are of a permanent character and those which are purely temporary. The innocent trespasser on adjacent property, or a bona fide claimant of title who goes on the land and makes improvements that are of a permanent character and so useful to the plaintiff owner should be allowed to show them and to deduct full compensation for the use of the premises. The question, in the case of Ege v. Kille[146] was between persons who were hostile claimants to the land. As between them all the machinery and implements necessarily used in working the mines became a part of the realty. Whether fast or loose all the machinery of an ore bank, which is necessary to constitute it such, and without which it would not be an ore bank equipped and ready for use as such, are a part of the freehold, and recovery of the land by the plaintiff also gave to them the ore bankds on it, with all the machinery necessary to constitute them, so equipped and ready for use. As some machinery was necessary to raise the ore and prepare it for the market it was proper to show what machinery was actually used for the purpose

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146. Ege v. Kille 84 Penn. 333.

and to submit its necessity and value to the jury. The defendants are entitled to an allowance for such improvements only as are of a lasting and permanent character, and which give a permanently increased value to the land.

In this case defendants were bona fide purchasers for value and were in possession under color of title, when the trespasses were committed. At the time they took possession the mines were unimproved. They expended large sums of money in their development, and made improvements of large value. Having acted in good faith in the working of the mines and the removal of the ore they were chargeable for the latter only with its value in place, which was to be ascertained by deducting the cost of mining, cleaning and delivering the ore in market, from its market value thus delivered, the difference being its value in place. And the court held that only those costs and expenditures which are reasonable and necessary should be deducted from the gross receipts. No extraordinary or unnecessary expenditures, may be deducted but only such, or so much thereof as are proper and legitimate. These only can be taken into account in ascertaining the real or legitimate

cost of mining, or the value of the ore in place.

MILLING COSTS.

So the innocent trespasser should be allowed to deduct the costs of reduction, concentration, and separation of the ore from the rock and other materials. Such operations add greatly to the value of the mineral, and are expenses which the owner would have to incur before he could place his product on the market. They do not injure the land of the plaintiff in any way. We have seen that the costs of transportation are almost universally allowed to the defendant, and still more ought the costs of the concentration and milling processes to be deducted from the amount which the plaintiff can recover from him.

In Fitzgerald v. Clark[147] the court, after granting to the defendant the costs of mining and hoisting said, that the basis of compensation should be the market value of the ore at the dump after deducting the cost of mining and hoisting the same. That is the appellant is given not only the cost of lifting and digging but also the expense of smelting and reducing the ore. In

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147. Supra 56.

the mind of the buyer the market value must necessarily be determined by deducting the cost of reducing the ore. Anyone buying the ore would deduct from the value the cost of reducing the ore to bullion, and having deducted such costs, he would make a bid for the ore, and this would constitute the market value. To the same effect the court, in the California case of Maye v. Yappen,[148] considered that the costs to be deducted by the innocent defendant included the expenses of separating the earth from the gold, after it is mined and brought to the place of washing.

COSTS OF ADMINISTRATION, DEPRECIATION OF PLANT, INTEREST ETC.

The same principles apply to the cost of administration as to the general mining costs. The trespasser is only permitted to deduct his expense and labour connected with the particular ore he has taken from the plaintiff. He cannot charge up the general cost of running the establishment to the plaintiff owner. But

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148. Maye v. Yappen, 23 Cal. 206.

here too a distinction should be made. Where the controversy arises between two adjacent mine operators, both mining their own properties, and having suitable appliances and facilities therefor, if one has made incursions into the mine of the other, the owner of the ore wrongfully taken ought not to have to pay for any portion of the general equipment belonging to and used by the trespasser, because he has these facilities already provided. But if the plaintiff is not engaged in mining and can only sell his mineral to others, then it would seem reasonable to permit the defendant to deduct some portion of his general operating expenses to the getting out of that particular ore.

So where the defendant has gone on the land under a bona fide claim of right, though mistaken as to his title, and erected his reduction plant, sunk a shaft, run his cross cuts, and installed a general mining equipment it would seem just that the cost of these improvements, so far as they are of a permanent useful and reasonable character should be allowed to the innocent trespasser, or at least some portion of it.

Thus in an Ohio case, of co-tenants, where one of the tenants made an effort to get the title from the other and failed, and in operating the mines on his own

lands, that were nearly surrounded by or abutted on the common estate, constructed passagewqys, tracks and other fixtures for running the coal from the common estate. It was held that fact as well as any other, natural or artificial, tending to enhance or diminish the value of the coal taken as it lay in its place, must be considered in fixing the value.[149]

Referring again to the Liberty Bell case, the jury were told not to deduct any fixed charges, salaries of officers and employes, expenses of constructing, developing and maintaining any portion of defendants mine, mill or plant, not incurred by reason of the extracting or treatment of the ores in controversy, even though they believed that by reason of the expense so incurred the cost of producing the particular ores in question may have been reduced. And in considering any testimony relative to such costs they must eliminate all items of the character above mentioned.

On the other hand a recent oil case in the supreme court of the U. S. allows even such costs to the innocent

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149. Keyes v. Pittsburg and Wheeling Coal Co. 58 Ohio St. 246.

trespasser. This was a suit in equity on a lease and sublease. On an accounting for the oil and gas taken under color of a lease later than that of the plaintiff but without actual knowledge thereof it was held that the later lessees were entitled to be credited with the cost of improvements, and operations incurred prior thereto, but not after the date in which they were actually notified of the rights of the earlier lessees. The continued taking thereafter was a wilful taking and appropriation of the property of anothef.[150]

But where the defendant failed to offer such testimony as would enable the jury to determine, with any degree of certainty what part, if any, of the gross expenses where incurred in superintending and maintaining its entire mine should be apportioned to that part of the mine from which the ore in controversy was extracted he was nàt permitteà to deduct such costs.[151]

The cases do not treat, with any great detail, of

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150. Supra 53.
151. Supra 145.

the matter of wear and tear of the plant, but on principle it would seem that such costs should not be allowed. The amount of depreciation of a plant by running through it a few hundred more tons of ore could hardly be measured. Such plants are seldom worn out, but serve their purpose, and not being of a movable nature, are finally abandoned. The same reasoning should apply to costs of capital and interest on the amount of money invested in the plant. Mining companies do not expect to make a profit on the general equipment, but it is charged up to profit and loss.

PROFIT.

The difference between giving the plaintiff the value of the mineral as it lies in its bed and the value at the pit's mouth less the cost of mining and raising to the surface is evidently the profits which the owner might hope to receive if he were to put the coal on the market at a favorable time. The better rule is to allow the owners this sum. If the trespasser is rewarded for his actual outlay in labour and expenses it is going far enough. The owner has been forced to make a sale at a time he did not choose, and very possibly to his disadvantage, and the profits there may be in the transaction should belong to him, and those cases which give the measure of damages as the value at the mouth of the shaft less the cost of severing and raising are the more reasonable.

Hence a tenant under an oil lease from the life

tenant was held liable to the remainderman in trespass, and the measure of damages was held to be the difference between what it sold for in the market and the cost of production, that is the profits. The excess of market value at the mouth of the shaft over the cost of production is the value in place to the owner if he is in the business of mining, but it may be otherwise with one who owns the lands which he is not himself mining, and who depends wholly on selling on a royalty basis.[152]

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152. Crawford v. Forest Oil Co. 57 Atl. 47.

SUMMARY.

The normal case, where a trespass has been committed, is the case of the owner seeking to get back his property which has been converted. The exceptional case is the one where the courts are enabled to allow the innocent trespasser the value of his labour and his expenses. In the early English and American cases the state of mind of the defendant in committing the trespass was held to make no difference. The owner could take his property wherever he could find it provided it could be identified. If it had been so intermingled and confused with other property, as was nearly always the case, he could recover the value of the ore in its improved condition no matter how much had been added to its value by the labour and expense of the defendant. Seeing the injustice of this the courts of law and of equity soon drew a distinction between the one who committed the trespass intentionally, and the one who trespassed inadvertently, and with no intention to do a wrong. The original rule is still applied to the wilful defendant, but the innocent trespasser is treated with consideration. And while there has been and still is much conflict in the decisions over just what items of costs he is to be allowed

to deduct when sued by the owner of the land for his trespass, the tendency has been toward the equitable rule of giving just compensation to the owner for his loss, and permitting the innocent trespasser to deduct all the value of his labour and expense so far as that is consistent with the rights of the owner.

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